No. 83-1437

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY MAREK, THOMAS WADYCKI and
LAWRENCE RHODE,

Petitioners,

vs.

ALFRED W. CHESNY,

Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

JOINT APPENDIX

JAMES D. MONTGOMERY, JR.
JAMES D. MONTGOMERY
& ASSOCIATES LTD.
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Pandick Midwest, Inc., Chicago • (312) 454-7600

PETITION FOR CERTIORARI FILED FEBRUARY 29,
1984; CERTIORARI GRANTED APRIL 23, 1984

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RELEVANT DOCKET ENTRIES IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS:

Date	Filings-Proceedings
10-15-79	Filed 10-5-79 complaint.
10-15-79	Filed 10-5-79 civil cover sheet.
10-15-79	Filed 10-5-79 affidavit re rule 39.
11- 2-79	Filed 11-1-79 appearance of defendants J. Marek, Thomas Wadycki, L. Rhode, and Raymond M. Chapman, individually and as members of the Berkeley Police Department with that of Jack M. Siegel as attorney; affidavit re rule 39.
12- 4-79	Filed 11-9-79 (appearance of Village of Berkeley with that of Schaffenegger, Watson & Peterson as attorney) letter to Judge Leighton from Raymond M. Chapman, Chief of Police, Berkeley police dept. dated November 7, 1979 re appearance.
12-29-80	Filed 12-22-80 plaintiff's notice of filing; plaintiff's first amended complaint
4- 9-81	Filed 4-3-81 defendant's notice; motion in lieu of answer to First amended complaint; memorandum in support of motion of Village of Berkley
4- 9-81	Filed 4-3-81 defendant's notice; answer and affirmative defenses to first amended complaint
11- 5-81	Enter order dated 11-3-81: Plaintiff is to submit a modified version of the pretrial order by November 13, 1981. Pretrial conference date of November 6, 1981, is reset to November 17, 1981, at 4:30 p.m.—Shadur, J.

Date	Filings-Proceedings
11-30-81	Enter order dated 11-17-81: Pretrial conference held. Order discovery is reopened to Close December 31, 1981. Pretrial order to be submitted by January 25, 1982. Status hearing is set forth February 5, 1982, at 9:15 a.m.—Shadur, J.
11-30-81	Enter order dated 11-17-81: Trial is set for April 19, 1982, at 10:00 a.m. (Draft)— Shadur, J.
3-25-82	Filed 3-19-82: Plaintiff's Pretrial Memorandum.
3-25-82	Filed 3-24-82: Defendants Marek, Wadycki and Rhode's Motion for an Order to reset the due date for final pretrial order.
3-29-82	Enter order dated 3-26-82: Status hearing held. Parties are granted an extension of time to and including April 16, 1982, within which to submit pretrial order.—Shadur, J.
4-21-82	Enter order dated 4-19-82: Trial begins. Opening statements heard and concluded. Evidence heard in part on behalf of plaintiff.—Shadur, J.
4-22-82	Enter order dated 4-20-82: Trial resumed—jury.—Shadur, J.
4-21-82	Enter order dated 4-21-82: Trial Resumed—Jury.—Shadur, J.
4-27-82	Enter order dated 4-23-82: Trial resumed—Jury.—Shadur, J.
4-26-82	Enter order dated 4-26-82: Trial Resumed—Jury.—Shadur, J.
4-29-82	Enter order dated 4-27-82: Trial Resumed—Jury.—Shadur, J.

Date	Filings-Proceedings
4-29-82	Enter order dated 4-28-82: Trial Resumed—Jury.—Shadur, J.
5- 4-82	Enter order dated 5-3-82: Trial Resumed—Jury.—Shadur, J.
5- 6-82	Enter order dated 5-4-82: Trial Resumed—Jury. Further evidence heard in part on behalf of defendants.—Shadur, J.
5- 7-82	Enter order dated 5-5-82: Trial resumed—jury.—Shadur, J.
5- 7-82	Enter order dated 5-6-82: Trial resumed—jury.—Shadur, J.
5-12-82	Enter order dated 5-10-82: Trial Resumed—Jury. Closing arguments held and concluded. Jury instructed. Marshal sworn. Two alternate jurors discharged. Jury deliberations commenced. Jury deliberations continued to May 11, 1982, at 9:00 a.m.—Shadur, J.
5-13-82	Enter order dated 5-7-82: Motion of Defendant Leslie J. David for Directed Verdict at the close of Plaintiff's evidence is granted.—Shadur, J.
5-13-82	Filed 5-11-82: Jury Verdict forms.
5-13-82	Enter order dated 5-11-82: Jury Deliberations resumed and concluded Jury returns its verdict finding for plaintiff Alfred Chesny as administrator of the extate of Steven Chesny and against defendants Marek, Wadycki & Rhode and assessing compensatory damages against said defendants collectively, in the total sum of $57,000.00 and assessing punitive

Date	Filings-Proceedings
	damages in the amount of $1,000.00 against said defendants, Jointly and Severally. (Total Damages $60,000.00). The Jury finds in favor of defendants Chapman and the Village of Berkeley and against plaintiff. Jury polled. Jury discharged. Enter Judgment on the verdict. Trial ends.—Shadur, J.
5-13-82	Enter 5-11-82, Judgment pursuant to Rule 58.—by the clerk.
5-13-82	Enter order dated 5-12-82: Order the four checks/drafts in the total sum of $60,000.00 tendered by defendants Marek, Wadycki, and Rhode in open court and refused by plaintiff, are to be deposited with the Clerk of this Court. Further ordered that by stipulation of the parties, without prejudice, tht plaintiff Alfred Chesny may endorse said checks/drafts to the Clerk of this Court for the purpose of depositing the funds in an income/interest bearing account, under the supervision of the Clerk.—Shadur, J.
5-14-82	Enter order dated 5-13-82: By agreement, order the Clerk of this Court is directed to invest the 3 cashier checks and the certified check, heretofore deposited with the Clerk, at the 1st National Bank of Chicago in U.S. Treasury Bills for approximately 30 days. Said treasury bills to be renewed upon maturity until further order of this Court. The endorsement of Alfred W. Chesny of said checks, for purpose of investment only, is without prejudice to rights of any party, and is not to be construed as an acceptance of such

Date	Filings-Proceedings
	monies in full settlement of any claim. (Draft)—Shadur, J.
6- 1-82	Filed 5-21-82 Plaintiffs motion for Additur or in the alternative for a new trial on the issue of compensatory damages
6- 1-82	Filed 5-21-82 Memorandum in support of motion for Additur or in the alternative for a new trial on the issue of compensatory damages
6- 1-82	Filed 5-21-82 Plaintiff's motion to attorneys' fees and costs
6- 1-82	Filed 5-21-82 Affidavit of James D. Montgomery in support of Plaintiff's petition for attorneys' fees and costs
6- 1-82	Filed 5-21-82 Affidavit of Brenda A. Minor in support of Plaintiff's petition for attorneys' fees and costs
6-15-82	Enter order dated 6-10-82: Plaintiffs brief in support of post trial motions is due by June 18, 1982. Defendants answering brief thereto is due by July 9, 1982. Plaintiffs reply brief is due by July 16, 1982. The Court will rule by mail—Shadur, J.
6-24-82	Filed 6-18-82: Plaintiff's Notice; Addendum to memorandum in support of motion for additur or in the alternative for a new trial on the issue of compensatory damages
6-24-82	Filed 6-18-82: Plaintiff's Notice; Motion for extension of time to file amended motion for attorneys' fees and costs.

Date	Filings-Proceedings
6-24-82	Enter order dated 6-21-82: Plaintiff is granted an extension of time to and including July 1, 1982 within which to file amended motion for attorneys fees & costs. Defendants' response thereto is due by July 22, 1982.—Shadur, J
7/ 7/82	Filed 7/6/82: Plaintiffs amended motion for attorney's fees and costs
8/13/82	Filed 7-29-82 Memorandum of defendants in opposition to plaintiff's post-trial motion and in support of defendants' post-trial motion; Exhibits attached
8/13/82	Filed 7-29-82 Motion of defendants Marek, Wadycki & Rhode (untitled) re: the award of attorneys' fees and costs
8/13/82	Filed 7/30/82 Addendum to defendant's post trial memorandum
8-17-82	Enter order dated 8-13-82: Motion of Defendants, Marek, Wadycki and Rhode for leave to file addendum to post-trial memorandum is granted.—Shadur, J.
8-20-82	Filed 8/19/82 Notice; Plantiff's reply to defendants' memorandum in opposition to plaintiff's post-trial motions and in support of defendants' post-trial motion
8-20-82	Enter order dated 8/19/82: Plaintiff is granted leave to file their reply to defendants' memorandum in opposition to plaintiff's post trial motions & in support of defendants' post trial motion, instanter.—Shadur, J.

Date	Filings-Proceedings
9/10/82	Enter order dated 9/3/82: Memorandum Opinion and order entered. Accordingly, defendants motion for judgment NOV and attorney's fees is denied. Plaintiffs motion for an additur is denied. Plaintiffs motion for fees as a prevailing party under Section 1988 is granted except that plaintiff shal be entitled to fees and costs incurred up only until the time of the offer of judgment. Plaintiffs counsel shall submit a revised fee request by Septembe 13, 1982. On or before September 20, 1982 defendant's counsel shall notify the court and opposing counsel whether an evidentiary hearing will be required—draft—Shadur, J
±	
9/15/82	Filed 9/13/82: Revised attorney's fees and costs request filed by plaintiff
9/20/82	Enter order dated 9/15/82: On motion of plaintiff, Alfred Chesny the clerk of this court is directed to pay Alfred W Chensy as administra- of the estate of Steven Chesney the sum of sixty thousand ($60,000) dollars heretofore deposited with the clerk of this court on May 13, 1982, together with any and all earnings thereon draft—Shadur, J
11/17/82	Filed 11/16/82: Clerks file copy of transcript of proceedings held before Judge Shadur on 5/6/82

Date	Filings-Proceedings
11/17/82	Enter order dated 11/16/82: Memorandum opinion and order entered. Accordingly, the sum of $32,000 in costs including attorneys fees is awarded to be taxed in favor of plaintiff Alfred W Chesny and against defendants draft—Shadur, J ac
11/29/82	Filed 11/24/82: Plaintiffs notice of appeal re order dated 10/3/82 and 11/16/82 ($70 paid)

RELEVANT DOCKET ENTRIES IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT:

Date	Filings-Proceedings
1983	
3-30	Filed 15c appellant's brief.
5/24	Filed 15c appellees' brief. per order.
6/7	Filed 15c appellant's reply brief.
r8/11	ORDER: Argument set for 9/30/83 at 2:00 p.m., limited to 20 min. per side.
	Sep 8 1983 Briefs distributed to panel.
r9/30	Filed 0&6C appellant's citation of additional authority per CR11. Dist.
r9/30	Heard and taken under advisement.
r10/18	Filed appellant's citation of additional authority. Dist.
r10/20	ORDER: Motion of 10/17 granted, clk of this court to file the 0*3c of appellees' supplemental memo.
r11/3	Filed opinion by Judge Posner, affirmed in part, reversed in part and remanded.
r11/3	Order: Final Judgment, affirmed in part, reversed in part, and the case is remanded. Costs on appeal are awarded to appellant.
11/9	Filed Bill of Costs and Attorneys' fees of plaintiff-appellant, $38,056.55
r11/17	Filed 15c defendants-appellees petition for rehearing w/sugg for rehearing en banc., Dist en banc.
r11/21	Filed appellees objections to plaintiff-appellant's bill of costs and attorneys' fees.

Date	Filings-Proceedings
1983	
r11/22/3	Filed motion to file supplement to petition for rehearing, filed by appellees.
r11/30	Order: Appellant's request for attorneys' fees on appeal shld be filed in the district court. Appellant is directed to resubmit an itemized bill of costs with this court on or before 12/12/83.
12/5	Filed clerk's copy of letter to appellant requesting 25c of his answer to the appellee's petition for rehearing w/sugg. for rehearing en banc. Petition is due 12/19/83.
v12-9	Filed appellant's bill of costs in amt. of $296.55.
v12-12	Filed appellant's motion for clarification.
v12-14	ORDER: It is this court's preference that appellant file its request for attys.' fees in the dist. ct. If appellant is not satisfied with the determination in that court, then appellant file its request with this court.
r12/16	Filed 25c answer to the petition for rehearing w/sugg for rehearing en banc dist. en banc
1984	
1/20	Order: Petition for rehearing w/sugg for rehearing en banc, filed 11/17/3 is hereby denied.
r1/24	Filed plaintiff-appellant's amended Bill of Costs.
2/28	Filed appellees Motion for stay of mandate, pending notice from the Supreme Court of docketing petition for writ of certiorari

Date	Filings-Proceedings
r3/8	Filed notice from Supreme Court petition for cert filed 2/29 their #83-1437
1983	
3/9	Order: Motion filed 2/28 by counsel for appellees granted the mandate of this court is stayed. Petition for writ of certiorari was filed with the Supreme Court on 2/29.
r4/26	Filed Notice from the Supreme Court, Petition for Certiorari granted
r5/7	Mandate issued and most of rec ret'd. all #s

RULE 39 AFFIDAVIT IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF ATTORNEY WILLIAM HOLLAND OF 10/5/79

UNITED STATES DISTRICT COURT

Northern District of Illinois

Eastern Division

ALFRED W. CHESNEY, et al.
Plaintiff(s)

vs.

J. MAREK, et al.
Defendant(s)

No.

Affidavit Evidencing Compliance With General Rule 39

WILLIAM E. HOLLAND Affiant is the attorney of record for Plaintiff, Alfred W. Chesney, etc. and has knowledge of the matters covered by this affidavit and has read General Rule 39.

Affiant has not directly or indirectly solicited employment by the above-named party or parties, and knows of no solicitation of said party or parties by any person that has resulted in the employment of the affiant, except (here state all exceptions, or if none state "no exception"): NO EXCEPTION

Affiant has not paid, or promised to pay, and knows of no payment or promise of payment to the above-named party, or parties, of the costs of this case, or of the medical, living or other expenses of any party, or of any part of an attorney's fee, or of any portion of the recovery by suit or settlement herein to any person whatever other than the above-named party or parties and the attorneys of record herein, except (here state all exceptions, or if none state "no exception"): NO EXCEPTION

Affiant has filed contemporaneously herewith a signed copy of any written contingent fee agreement applicable to his compensation for representing the above-named party or parties in this action and represents that a signed copy thereof has been furnished to each party he represents; if no copy of a

contingent fee agreement is filed herewith, affiant represents that his compensation for services in this case is not on a contingent basis.

/s/ WILLIAM E. HOLLAND
(Affiant)

Subscribed and sworn to before me this 5th day of October, A.D. 1979.

/s/ illegible
Notary Public

OFFER OF JUDGMENT IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, BY MAREK, et al., SERVED 11/5/81:

November 5, 1981

James D. Montgomery, Esquire
39 South LaSalle Street
Chicago, Illinois 60603

RE: Chesny v. Marek, et al.
Case No. 79 C 4186

Dear Jim:

We hereby serve you our Offer of Judgment. Pursuant to the Federal Rules of Civil Procedure, this Offer is not filed with the Clerk of the U.S. District Court.

Very truly youus,

SCHAFFENEGGER, WATSON & PETERSON, LTD.
by: DONALD G. PETERSON

DGP/dg
Enc.

cc: Baker & McKenzie
130 East Randolph Street
Chicago, Illinois 60601

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, Individually and as Administrator of the Estate of STEVEN CHESNY, Deceased,
Plaintiff
vs.
J. MAREK, Individually and as a Police Officer of the VILLAGE OF BERKELEY, et al.,
Defendants
No. 79 C 4186

Offer of Judgment

To: James D. Montgomery
Attorney for the Estate of Chesny
39 South LaSalle Street
Chicago, Illinois 60603

PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 68, the defendants, JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE, hereby offer to allow judgment to be taken against them by the plaintiff for a sum, including costs now accrued and attorney's fees, of ONE HUNDRED THOUSAND ($100,000) DOLLARS.

SCHAFFENEGGER, WATSON & PETERSON, LTD.

by: /s/ DONALD G. PETERSON

SCHAFFENEGGER, WATSON & PETERSON, LTD.
Attorneys for Defendants Jeffrey Marek, Thomas Wadycki and Lawrence Rhode
69 West Washington Street
Chicago, Illinois 60602
346-5430

AFFIDAVIT OF MAY 21, 1982 IN THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF JAMES D. MONTGOMERY IN SUPPORT OF PLAINTIFF'S PETITION FOR ATTORNEYS' FEES AND COSTS:

RECEIVED
MAY 21, 1982
MILTON I. SHADUR
U. S. DISTRICT COURT JUDGE

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, individually, and as Administrator of the Estate of Steven Chesney, Deceased, *Plaintiff,*	
vs.	No. 79 C 4186 Hon. Milton Shadur
J. MAREK, et al., *Defendants*	

Affidavit of James D. Montgomery in Support of Plaintiff's Petition for Attorneys' Fees and Costs

JAMES D. MONTGOMERY, upon being duly sworn on oath, do depose and state as follows:

1. I am one of the attorneys for the plaintiff in *Chesny v. Marek, et al.,* 79 C 4186, and I have represented the plaintiff since this litigation began.

2. Since my involvement in this case began, I have spent a total of 628.50 hours on this matter, which includes both pretrial and trial work, up to the time of verdict. (See the forthcoming Statement of Attorneys Time.)

3. I have not received any fees for my services in this litigation, and any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C., Sec. 1988.

4. I received a J.D. from the University of Illinois, Urbana. in 1956.

5. I have been a licensed attorney since November, 1956. I am currently licensed to practice before the Supreme Court of Illinois, the United States District Court for the Northern District of Illinois, the United States Court of Appeals, District of Columbia Circuit, the Seventh Circuit Court of Appeals, and the Supreme Court of the United States. I have practiced before various courts in Indiana, Iowa, Michigan, California, South Carolina and Nevada, in addition to the 25 years of litigation experience before the aforementioned courts.

6. I am currently the President and principal attorney of James D. Montgomery and Associates, Ltd. My firm specializes in civil and criminal litigation at the trial and appellate levels.

7. In addition to my years of private practice, I worked from 1958 to 1960 as an Assistant U.S. Attorney, Northern District of Illinois, Criminal Division.

8. I am currently an adjunct professor at DePaul University, and have been a lecturer and instructor for the National College of Criminal Defense Lawyers since 1975.

9. Throughout my 25 years at the bar, I have specialized in criminal defense litigation, and have recently turned my attention to civil rights litigation and personal injury and medical malpractice litigation. The following constitute a few of the major cases I have worked on:

a) *People v. Black* (1966)—I represented one of two brothers who were charged with the robbery of the Rainbow Supermarket and the murder of a police officer.

b) *People v. Frederick Douglas Andrews* (1968)—I represented one of three Chicago westside community leaders charged with arson, in connection with fires which were set after the death of Martin Luther King, Jr.

c) *Inquest into the Deaths of Fred Hampton and Mark Clark* (1969)—I represented the families of Mark Clark and Fred Hampton, together with Deborah Johnson, in connection with investigations and hearings stemming from the raid on the Black Panthers' apartment on December 4, 1969, Chicago, Illinois.

d) *People v. Charles Edward Bey, et al.* (1970)—I successfully represented seven leaders of the Black P Stone Nation in connection with the slaying of police officer, James A. Alfano.

e) *United States v. Jeff Fort, et. al.* (1971)—I represented 21 leaders of the Black P Stone Nation in a federal trial resulting from alleged misuse of federal funds via a grant to the Woodlawn Organization.

f) I represented two young men who were charged with the armed robbery of a Brinks truck and its guard.

g) *People v. Edward Moran, et. al.* (1973)—I represented one of six men (De Mau Maus) charged with robbery and murder in Lake and Cook County, Illinois. My client, Edward Moran, during the course of the trial, was found dead in his cell in the special lock-up in the Lake County Jail in Waukegan, Illinois.

h) *United States v. Irvin Potter, et. al.* (1975) I represented nine men in a federal trial in connection with a policy and gambling operation.

i) *Iberia Hampton et. al. v. Edward V. Hanrahan, et. al.* (1976)—I was the chief counsel of the legal team representing the families of Fred Hampton and Mark Clark, along with other survivors of the Panther raid on December 4, 1969, in civil litigation wherein Edward V. Hanrahan (former State's Attorney of Cook County) and certain FBI agents and police officers of the City of Chicago were defendants therein. The trial commenced in January, 1976

and concluded in June, 1977. The case was appealed to the U. S. Court of Appeals for the Seventh Circuit and argued August 14, 1978, with the Opinion being rendered April 23, 1979, reversing as to certain defendants and remanded for a new trial.

j) *People v. David Muhammad, et. al.* (1978)—I represented David Muhammad, one of five young men charged with robbery, murder and conspiracy, known as the "I-57 Murders".

k) *United States v. James Blakey, et. al.* (1978)—I represented two Chicago police officers charged with extortion.

l) *United States v. Charles Wilson, et. al.,* (1981) I represented one of ten defendants who were charged with conspiracy and engaging in a continuing criminal enterprise, in violation of 21 U.S.C., Secs. 846 and 848, in connection with the alleged operation of a drug ring. The first trial resulted in a hung jury as to my client, Harry Cannon, and guilty verdict as to the other nine defendants. Upon retrial, my client was found guilty. The case is currently on appeal to the U. S. Court of Appeals for the Seventh Circuit.

10. In addition to the above, I am currently engaged in the following civil rights litigation:

a) *Rose Bluestein, etc., et. al.,* Civil -LV-80-399-HEC, before the United States District Court for the District of Nevada.

I represent the plaintiffs in their civil rights action against various members of the Las Vegas Metropolitan Police Department, the Sheriff of Clark County, Nevada, the City of Las Vegas, the County of Clark, Nevada, and various members of the Las Vegas Metropolitan Police Commission, as a result of the shooting death of plaintiffs' decedent.

b) *William Sanders v. Hall, et. al.*, Case No. 77 C 1818, before Judge J. Samuel Perry.

I represent the plaintiff in his civil rights action against various police officers, resulting from the defendants' shooting of the plaintiff.

11. I am familiar with fees customarily charged in this district by attorneys with my skill and experience. I am requesting that fees be awarded to me in this case at the rate of $150.00 per hour as reasonable and appropriate, given my experience and the work I have done on this case. I customarily charge to and receive from most of my clients, $200.00 per hour for my time and $1,500.00 per diem for trial.

12. The forthcoming Statement of Attorneys Time accurately sets forth the number of hours of trial I spent working on this matter.

Further, affiant sayeth not.

/s/ JAMES MONTGOMERY
Affiant

SUBSCRIBED AND SWORN TO before me this 21st day of May, 1982.

/s/ WILLIAM E. HOLLAND
Notary Public

MEMORANDUM OPINION OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF SEPTEMBER 3, 1982, REPORTED AT 547 FED. SUPP. 542 (APPENDIX B TO PETITION FOR WRIT OF CERTIORARI).

MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT, NORTHERN DISTRICT OF ILLINOIS, OF NOVEMBER 16, 1982, UNPUBLISHED:

IN THE UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

ALFRED W. CHESNY, etc., *Plaintiff,* v. J. MAREK, et al., *Defendants.*	No. 79 C 4186

Memorandum Opinion and Order

Alfred W. Chesny ("Chesny"), individually and as administrator of the estate of his deceased son Steven, sued various defendants under 42 U.S.C. § 1983 ("Section 1983") and a number of state tort laws, charging the unlawful fatal shooting of Steven. After trial on the merits a jury found in part for Chesny and awarded a total of $60,000 against defendants Marek, Wadycki and Rhode.

On September 3, 1982 this Court issued its memorandum opinion and order (the "Opinion," 547 F.Supp. 542) dealing with several post-trial motions:

1. It denied Chesny's motion for an additur to the jury verdict.

2. It denied defendants' motion for judgment n.o.v. and a related motion for attorneys' fees and costs.

3. It granted Chesny's motion for fees as a prevailing party under 42 U.S.C. § 1988 ("Section 1988"), but ruled that Chesny was entitled to fees and costs incurred only up to the time of defendants' offer of judgment under Fed. R. Civ. P. ("Rule") 68.

Both sides have accepted the first two rulings, so that the only remaining issue is the amount of the fee award to Chesny.

After Chesny's counsel had tendered a fees request revised downward to $34,392.35 to conform to the principles stated in the Opinion, defendants' counsel Donald Peterson wrote the Court:

> Please be advised that attorney Montgomery on behalf of the plaintiff and the undersigned on behalf of the defendants have reached an agreement on attorneys' fees in the sum of $32,000 and no evidentiary hearing on the issue will be required.

In reply Chesny's counsel made plain that the portion of his revised request asking for a multiplier ("Plaintiff renews his request tha this Court enhance this lodestar award by an appropriate multiplier") continued to apply to the agreed-upon $32,000 figure:

> Mr. Peterson's letter correctly sets forth our agreement. However, it should not be understood as a waiver of our pending claim and request that you enhance the lodestar amount of $32,000 by an appropriate multiplier.
>
> The sole purpose of our agreement was to avoid a testimonial hearing upon our Amended Claim for Attorney's Fees in the amount of $34,392.35.

This Court has evaluated the request in light of all the factors identified in *Waters v. Wisconsin Steel Works*, 502 F.2d 1309, 1322 (7th Cir. 1974), *cert. denied*, 425 U.S. 997 (1976)

and often repeated since *Waters*. All Chesny's counsel has ever asserted as the basis for increasing the lodestar figure is a conclusory statement in his initial motion for fees and costs:

> Plaintiff also asks that this Court enhance this base amount with a multiplier to reflect contingency, undisirability [sic], and the quality of work.

Lead counsel James Montgomery's supporting affidavit reflects that "any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C. Sec. 1988."

Application of the *Waters* factors in the aggregate, as this Court is bound to do, negates the conclusion that Chesny's counsel has demonstrated the appropriateness of a multiplier. Though counsel certainly did a workmanlike job in representing his client, no new legal trails had to be (or were) blazed in the lawsuit. Fees and costs of some $32,000 in light of a $60,000 jury verdict are not out of line (that is, there is no need to enhance the fee award in light of the jury's evaluation of the case). And as indicated in the Opinion (547 F.Supp. at 548 n.5), the hourly rate for lead counsel's time (even when reduced to $135-140, the precise figure depending on how the agreed-upon reduction in the claim is allocated among the several counsel and paralegals) is a reasonable one without multiplication.

For the foregoing reasons, in accordance with Section 1988, the sum of $32,000 in costs including attorneys' fees is awarded to be taxed in favor of Chesny and against defendants.[1]

/s/ MILTON I. SHADUR
Milton I. Shadur
United States District Judge

Date: November 16, 1982

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[1] This award takes into account attorneys' time spent only until the offer of judgment under Rule 68, in accordance with the principles stated in the Opinion, 547 F.Supp. at 545-47.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OF NOVEMBER 3, 1983, PUBLISHED AT 720 FED. 2ND 474 (APPENDIX A TO PETITION FOR WRIT OF CERTIORARI).

PETITION OF MAREK, ET AL., FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT FILED 11/17/83:

No. 82-2927

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

ALFRED W. CHESNY, Individually, and as Administrator of the Estate of STEVEN CHESNY, Deceased, *Plaintiff-Appellant* *vs.* JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE, *Defendants-Appellees*	Appeal from the United States District Court for the Northern District of Illinois — No. 79 C 4186 Judge Shadur

Petition for Rehearing
With Suggestion for Rehearing In Banc

DONALD G. PETERSON, of counsel
SCHAFFENEGGER, WATSON & PETERSON, LTD.
Attorneys for Defendants-Appellees
69 West Washington Street
Chicago, Illinois 60602
346-5430

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TABLE OF CASES AND STATUTES

No. 82-2927

IN THE

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

ALFRED W. CHESNY, Individually, and as Administrator of the Estate of STEVEN CHESNY, Deceased,
Plaintiff-Appellant

vs.

JEFFREY MAREK, THOMAS WADYCKI and LAWRENCE RHODE,
Defendants-Appellees

Appeal from the United States District Court for the Northern District of Illinois

No. 79 C 4186

Judge Shadur

Petition for Rehearing,
With Suggestion for Rehearing In Banc

NOW COME defendants-appellees, MAREK, WADYCKI and RHODE, and respectfully petition for a rehearing, with suggestion for rehearing *in banc,* of this Court's decision of November 3, 1983 which affirmed in part and reversed in part the District Court's ruling that under 42 USC § 1988 the plaintiff may only recover attorney's fees and costs accrued to the date of a valid Rule 68 offer of judgment. On November 3, 1983, this Court held that, despite the validity of a Rule 68 offer of judgment, the plaintiff's attorney shall receive attorney's fees for all services performed after the rejection of an offer of judgment which proved to be more favorable than his jury verdict.

This petition is based on the following point:

By blocking the application of Rule 68 to attorney's fee petitions under § 1988, while at the same time, refusing to consider the effect of the plaintiff's additional fees under his contingent fee contract, which was first revealed here in oral

argument, this Court has stepped beyond the philosophy underlying § 1988, which is to provide *reasonable* attorney's fees in light of all relevant factors. *Hensley v. Eckerhart,* ____ U.S. ____, 103 S. Ct. 1933 (1983); *Johnson v. Georgia Highway Express, Inc.,* 488 F. 2d 714 (5th Cir. 1974); Senate Report, 94-1011, 10/1/76: Reprint US Code Cong. & Ad. News 5908, 1976. This Court has now created an avenue for plaintiff's attorneys in civil rights cases to be unreasonably and unjustly enriched through windfall fees. The emasculation of Rule 68 can devastate the judicial administration of this Circuit. This case is one of first impression, but is contrary to analogous rulings by the Tenth Circuit, Second Circuit, Ninth Circuit and Sixth Circuit.[1] Since the oral argument in this case on September 30, 1983, Judge John M. Canella, in direct conflict with this Court's opinion of November 3, 1983, filed his opinion on October 19, 1983 in the Southern District of New York, holding that Rule 68 is applicable to fees under § 1988. *Lyons v. Cunningham* (Oct. 19, 1983, 79 C-3953/JMC). The appellees respectfully suggest that this rehearing be conducted *in banc* to assure consistent application of the Federal Rules of Civil Procedure in the service of the efficient and effective judicial administration in this Circuit.

[1] See citation and discussion of these authorities at pages 5 to 9 of this Petition. (A-33 to A-36)

Argument

By Allowing an Attorney for a Civil Rights Plaintiff to Recover All "Reasonable" Attorney's Fees Under 42 USC § 1988 Plus a Percentage Under a Contingent Fee Contract With His Client, This Court Is Tolerating an Inappropriate and Unjust Enrichment to the Plaintiff's Attorney.

In the opinion of November 3, 1983, this Court has held that Rule 68 can never abrogate the right to attorney's fees by a civil rights plaintiff even though the offer of judgment is valid and the plaintiff subsequently obtains a judgment less than the offer. The Court has remanded the case to the District Court for a determination of "reasonable attorney's fees for services by the plaintiff's lawyer subsequent to the offer of judgment".

In its opinion, this Court further recognizes that the plaintiff and his attorney in this case had a contingent fee contract. On page 6 of the slip opinion, this Court states: "The plaintiff and his lawyers had a contingent fee arrangement in this case, though its terms are not in the record. . ." This fact was first brought to the attention of the appellees and this Court during oral argument. At no time prior to oral argument did the plaintiff or his attorney disclose the fact that a contingent fee contract was ever in existence. The significance of the contingent fee has never been briefed or argued.

The first documented reference by plaintiff's attorney to the contingent fee contract was submitted in his Bill of Costs And Attorney's Fees, filed with this Court on November 9, 1983, wherein the plaintiff states in paragraph 13: "That the nature of the petitioner's contractual relationship with his attorney is one of contingent fee." A review of the District Court docket and file would demonstrate that the plaintiff failed to file a copy of his contingent fee contract with his Affidavit of Compliance with General Rule 39. Rule 39 of the United

States District Court for the Northern District of Illinois requires plaintiff's attorney to file contemporaneously with his affidavit a signed copy of any written contingent fee agreement applicable to his compensation for representing the plaintiff. According to the Rule, if no copy of the contingent fee agreement is filed, the plaintiff's attorney is representing under oath that his compensation for services in the case is not on a contingent basis. The docket sheet contains no reference to the contingency fee contract, which is where it would be listed if the agreement is being held in the Court vault.

This Court bases its award of post offer of judgment fees on its view of the underlying philosophy of § 1988 which holds that the plaintiff's attorney is entitled to reasonable attorney's fees. Section 1988 provides that the District Court has the discretion of allowing reasonable attorney's fees to be paid as a part of the costs to the prevailing party in a civil rights case. The Congressional intent is to encourage attorneys representing civil rights litigants in meritorious actions by providing for the payment of attorney's fees to the prevailing party.

It is submitted, however, that Congress did not intend, nor have the Courts permitted, 42 USC § 1988 becoming a vehicle for excessive and exorbitant fees being paid to civil rights attorneys. Yet that is precisely the result which occurs in this instance when the unannounced and unknown contingent fee contract is coupled with this Court's permission for the plaintiff's petition for every dollar of "reasonable attorney's fees" he can substantiate through his time records.

Section 1988 establishes the standard that attorney's fees, first and last, must be "reasonable". Under the holding in *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968), the policy has been established that a prevailing party should "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust". *Id.* at 402.

While Courts may not have held contingent fee contracts to be an automatic death knell to a prevailing party's request

for attorney's fees under § 1988[2], the majority opinion among the Circuits demonstrates that contingency fee agreements are to be closely scrutinized for their effect on what constitutes a "reasonable" attorney's fee.[3] *Rosquist v. SooLine R.R.* 692 F. 2d 1107 (7th Cir., 1982). In *Krause v. Rhodes*, 640 F. 2d 214 (6th Cir., 1981), the Sixth Circuit refused to permit the attorney's collection of his contingent fee in a civil rights case. *Krause v. Rhodes* was the litigation resulting from the death and injuries of several Kent State students by the Ohio National Guard in 1970. A former attorney for the plaintiffs sought to enforce his contingent fee contract after the $675,000 settlement was accepted. In refusing to recognize the contingent fee agreement, the Sixth Circuit stated that "(w)hile the language of § 1988 does not expressly empower a district court to limit fees derived under a private agreement between prevailing attorney and his client, it is indicative of the extensive powers available to district judges in supervising attorney's fees awards in civil rights cases". *Id.* fn. 5 at 218-219.

This exercise of the Court's "extensive power", which also allows discretionary *denial* of attorney's fees under § 1988 in the face of a contingent fee agreement, is not without precedent. In *Brown v. Stackler*, 612 F. 2d 1057 (7th Cir., 1980), the attorney was denied all fees, including his fee under § 1988, wherein the plaintiff had sought to enjoin under 42 U.S.C. § 1983, the enforcement of Illinois statutes concerning prices advertised for eyeglasses. The Ninth Circuit in *Buxton v. Patel*, 595 F. 2d 1182 (9th Cir., 1979) found that the district court had not abused its discretion in denying attorney's fees under § 1988 where adequate compensation was available through the verdict. The Ninth circuit in *Buxon* cited with approval the Second Circuit's opinion in *Zarcone v. Perry*, 581 F. 2d 1039

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[2] *Sargent v. Sharp*, 579 F. 2d 645 is in a minority among the Circuits in the automatic allowance of contingency attorney's fees.

[3] See discussion of cases, *Infra*, Petition for Rehearing, pp. 6 to 9. (A-33 to A-36)

(2d Cir., 1978), which held that the *Newman v. Piggie Park, supra* standard should not be applied "woodenly without consideration of the underlying factors which generated it". *Zarcone, supra* at 1044. The *Buxton* Court has articulated the applicable standard for the instant case: that Courts should hesitate to shift attorney's fees under § 1988 where the plaintiff's case for damages, not injunctive relief, is quite sufficient to attract and compensate competent trial counsel. It is respectfully submitted that the Seventh Circuit should adopt this standard and apply it in this case.

Here, the plaintiff's attorney has belatedly confirmed that he has a contingent fee agreement with Mr. Chesny. Appellees presume that the contingent fee has been collected from the $60,000 paid on judgment, which amount would be over and above the $32,000 in pre-offer fees paid. The nature of contingent fee agreements recognize an element of a risk being taken by the attorney who is a party to the contract. Contingent fee contracts normally provide that a percentage, usually thirty to forty percent in this District, will be recovered by the attorney only in the event of a monetary verdict in favor of the attorney's client. In this instance, the plaintiff's lawyer is in all likelihood recovering on his "risk" through the contingent fee contract with Mr. Chesny without taking any risk at all. Refusal or failure to factor in the true and correct amount that the plaintiff's attorney has received under a contingent fee contract circumvents the Congressional intent behind § 1988 and negates the specific language of that section.

This contingent fee agreement with Mr. Chesny may have already netted the plaintiff's counsel an additional $20,000 or $24,000 or more. The civil rights award was $5,000 plus $3,000 punitive damages plus $52,000 damages to the Estate. Plaintiff's attorney has already been paid by agreement $32,000 in pre-offer attorney's fees and is now seeking an additional $173,000 in post-offer fees plus $38,000 for the appeal of the attorney's fee issue only. Thus, the plaintiff's attorney may by this Court's opinion recover approximately $264,000 in fees on

a verdict of only $60,000 which was paid virtually without a post-trial motion by defendant. The jury was asked by plaintiff's attorney for a $3,500,000 verdict. The real substance of the post-trial proceedings has only involved attorney's fees.

In refusing to allow an attorney two chances for attorney's fees—once through contingency fee agreement and again through § 1988—the Court in *Cooper v. Singer,* 689 F. 2d 929, 931 (10th Cir., 1982) accurately summarized the problems:

> The congressional policy behind § 1988 is set forth in Senate Report No. 94-1011 (Oct. 1, 1976), reprinted in (1976) U.S. Code Cong. & Ad. News 5908. The report states that civil rights laws depend heavily on private enforcement, and that the purpose of the law is to provide plaintiffs with an opportunity to enforce their rights undeterred by the possibility of large attorney's fees. The report contains a brief discussion of how to determine reasonable rates, and approves of standards that "are adequate to attract competent counsel, but which do not produce windfalls to attorneys". *Id.* at 5913. This caution against "windfalls" for attorneys shows that Congress was exclusively interested in making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making civil rights actions more attractive to prospective plaintiffs. Congress was not trying to get these cases into court by making them lucrative to attorneys. Therefore, an award of attorney's fees which benefits a plaintiff's attorneys rather than a plaintiff does not further congressional policy. Such awards may, in the discretion of the court, be denied.
>
> A grant of attorney's fees where a contingent fee agreement has been entered into without more may result in something of a windfall for attorneys. It relieves the attorney of part of the risk undertakne by the nature of the contingent fee contract, and preserves to the attorney the benefits of such a contract. It is apparent that if the case is lost the fee is also lost under either a contingent fee agreement or § 1988. If the case is won the attorney need not be content with the percentage for which he contracted as it remains on the floor.

> A claim under § 1988 would provide the chance for a greater amount. Yet he would still be entitled to his percentage under the contingent fee contract, even if that percentage exceeded the reasonable value of his services. The attorneys here assert that they have the option to take the higher figure. This can not be done. an automatic allowance of attorney's fees despite contingent fee agreements would thus have the effect of insuring an attorney without necessarily improving the position of the prevailing party. The admonition of the Senate Report to avoid windfalls to attorneys indicates that this was not the congressional intent behind § 1988.

The appellees respectfully disagree with the relevance of this Court's apparent inference that it is unjust to require plaintiff's civil rights attorneys to "think very hard before rejecting (a Rule 68 offer of judgment) . . . knowing that the rejection could cost themselves or their client a lot if it turned out to be a mistake". Slip Op., p. 8. This apparent inference is not relevant to the policy of § 1988. It confuses guaranteeing a fee to a lawyer, good or bad, with the exoneration of his client's civil rights. The lawyer's rights, not the client's, are here at issue on this appeal. While reasonable attorney's fees serve public policy and should be allowed to attorneys for prevailing parties, the Federal Rules of Civil Procedure should also apply, including Rule 68, to all attorneys before this Court. Limiting Rule 68's applicability to costs for postage and photocopying creates a special class of plaintiffs' attorneys with special rights. It does nothing to vindicate their client's civil rights.

Because this Court has now ruled that defendants in a civil rights case can never protect themselves from payment of the prevailing plaintiff's attorney's fees by using the Federal Rules of Civil Procedure, this Court on rehearing should at minimum clarify the proper role the previously undisclosed contingent fee contract is to play on remand in the determination of the plaintiff's "reasonable" attorney's fees. It is submitted that this

Court should instruct the District Court to deduct any and all amounts previously received by the plaintiff's attorney from any amount determined to be the reasonable attorney's fees. The mandatory election by plaintiff's attorney of contingent fees or § 1988 fees would be the only alternative way of preventing unjust enrichment. The plaintiff's attorney has made that election by entering into a contingent fee contract and presumably collecting on it.

Conclusion

Rule 68 can greatly benefit the administration of justice by the trial courts in this Circuit. Abolition of Rule 68 in civil rights cases will have the opposite effect for the disposition of civil rights cases in the trial court. Due to the unique question of the interplay between § 1988 which provides for the payment of reasonable attorney's fees and the contingent fee contract which is now acknowledged to exist in this case, the defendants-appellees are requesting that the Seventh Circuit Court of Appeals review this matter *in banc*. This question is one of first impression in this Circuit, as is the question of the Rule 68 applicability to § 1988. The appellees respectfully suggest that these issues are of exceptional importance to the administration of justice with wide ranging impact in the District Court.

For the foregoing reasons, defendants-appellees request an opportunity for a rehearing on this point. Due to the fundamental nature of the question presented and the effect on the judicial administration of this Circuit Court, it is suggested that the rehearing be before the entire Court sitting *in banc*.

DATED: November 17, 1983.

Respectfully submitted:

SCHAFFENEGGER, WATSON & PETERSON, LTD.

by: /s/

DONALD G. PETERSON
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Attorneys for Defendants-Appellees
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ANSWER OF CHESNY TO THE PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, FILED 12/16/83:

No. 82-2927

IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ALFRED W. CHESNY, individually, and as Administrator of the Estate of Steven Chesny, Deceased *Plaintiff-Appellant* *v.* J. MAREK, et al. *Defendants-Appellees*	Appeal from the United States District Court for the Northern District of Illinois, 79 C 4186 The Honorable Milton Shadur, Presiding Judge

Answer to the Petition for Rehearing With Suggestion for Rehearing In Banc

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IN THE UNITED STATES COURT OF APPEALS
For The Seventh Circuit

ALFRED W. CHESNY, individually, and as ADMINISTRATOR OF THE ESTATE OF STEVEN CHESNY, DECEASED
Plaintiff-Appellant

v.

J. MAREK, etal.
Defendants-Appellees

No. 82-2927

Answer to the Petition for Rehearing With Suggestion for Rehearing In Banc

Now comes plaintiff-appellant, Alfred W. Chesny, and respectfully answers the petition for a rehearing, which suggested a rehearing in banc, of this Court's decision of November 3, 1983 which affirmed in part and reversed in part the District Court's ruling regarding the effect of a Rule 68 offer of judgment on post-offer attorneys' fees.

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TABLE OF CASES AND STATUTES

Introduction

This Honorable Court, in arriving at its decision regarding the applicability of Rule 68 to post-offer attorneys' fees under Sec. 1988, gave full consideration to all factors that were properly before the Court and germane to both the legal and factual questions involved. Appellant's fee arrangement is not material to that decision.

Appellees are not entitled to study and reargue their case again on Petition for Rehearing simply because they failed to raise a point of argument earlier. *Anderson v. Knox*, 300 F.2d (9th Cir. 1962). The purpose of the petition is to direct the Court's attention to matters of "material" fact or law, which it overlooked in deciding a case and which, had it been given consideration, would have brought about a different result. *Board v. Brown & Root, Inc.*, 206 F.2d 73 (8th Cir. 1953).

Appellees as well as the District Court were apprised of the contigent nature of appellant's contractual relationship with his counsel prior to the entry of the Order upon which this appeal was taken. By making erroneous assertions and/or assumptions of fact, the appellees have attempted to induce this court to reconsider its Opinion. Appellees have asked this Court to render an advisory opinion in a matter that upon remand would, in any event, be decided by the District Court pursuant to Sec. 1988.

This case is not factually within the cases cited by appellees inasmuch as appellant's counsel would hardly be unjustly enriched under this fee arrangement. If fact, counsel is worse off under his contingent fee contract. This Court has created no new avenues for the enrichment of plaintiff's attorneys, since the mechanisms and safeguards protecting parties from exhorbitant attorneys' fees are just as viable now as they were prior to the decision rendered in this appeal.

Argument

I

Appellees Have Failed to State a Meritorious Basis to Support Their Suggestion for Rehearing In Banc

Under the Rules of the U. S. Court of Appeals for the Seventh Circuit, Rule 16(b), a suggestion for rehearing in banc is proper when the petition states in a concise sentence reasons why the appeal is of exceptional importance, or with what decision of the United States Supreme Court, this Court or another Court of Appeals, the panel decision is claimed to be in conflict.

Appellees attempt to bestow exceptional importance status on the "reasonableness" of the attorney's fees question, but fall woefully short as no determination has yet been made by the District Court regarding the "reasonableness" of fee requests in this case. Moreover, the facts of this case do not support their argument.

The key issue on appeal of the inapplicability of Rule 68 to Sec. 1988 fees is of exceptional importance, but is wholly independent of questions of reasonable Sec. 1988 fee requests. The Rule 68 issue goes to whether appellant is entitled to make a fee request. To bootstrap the two issues together in order to have the key issue reheard in banc is inappropriate.

No cases cited by appellees in their suggestion have held contrary to this court's decision, nor do those cases suggest that the potential for unreasonable attorney's fee requests in different cases is a factor to take into account in determining whether a fee request can be made for post Rule 68 offer fees.

II

The Issue of the Reasonableness of the Appellant's Attorney's Fees Under 42 U.S.C., Sec. 1988 Is Not Properly Before This Court.

In its opinion dated November 3, 1983, this Court held that Rule 68 cannot be applied to abrogate substantive rights of recovery to the plaintiff allowed under Sec. 1988. As the appellees pointed out in their petition, the Court remanded this cause to the District Court for a determination of a "reasonable" attorney's fee for services performed on behalf of Mr. Chesny after the offer of judgment.

The appellees now attempt to induce this court to hear a premature argument as to what constitutes a reasonable fee in this case, implying that (1) either the question has been decided in the District Court thereby impairing their rights and remedies in that forum, (2) the District Court is ill-equipped to perform the duties bestowed upon it by Sec. 1988 and the applicable case law, or (3) appellees have not waived their rights to have their argument reviewed.

Appellees attempt to lend credence to their implication of prejudice and non-waiver by erroneously suggesting to this Court that the existence of a contingent fee arrangement was first brought to their attention during oral argument. The record shows that, via affidavit to the District Court on May 21, 1982, Mr. Chesny's counsel, James D. Montgomery, apprised the Court as to one of the factors impacting on a reasonable fee, that ". . .any fees I would be entitled to were and are contingent upon the outcome of this cause, and 42 U.S.C., Sec. 1988."

The Affidavit was filed with the District Court and served upon the appellees' counsel. If, perchance, this reference to a contingent fee relationship escaped the attention of appellees, they could have seen the very same reference made on page 3 of Judge Shadur's Memorandum Opinion and Order of

November 16, 1983. Had it escaped appellee's attention once more, they might have seen it when they included it in their own brief on appeal. (See Appellee's Brief, Appendix B, p.3).

While the reference made in the record does not disclose the terms of the agreement, appellees had no objection to its existence. Indeed, they settled, by agreement with Mr. Chesny on a figure they believed to be a reasonable pre-offer fee without inquiring into the terms of Mr. Chesny's fee agreement.

As appellees correctly state, Mr. Chesny's counsel inadvertently failed to attach the contingent fee agreement (See Exhibit #1) to his Rule 39 Affidavit. This oversight can and will be corrected simply by filing an amended Rule 39 Affidavit upon remand. Heretofore, none of the parties have been prejudiced as a result of the defective Rule 39 Affidavit, and appellees have not asserted that they relied upon it to any extent.

As to the additional attorneys' fees to be granted upon remand, it is the obligation of the District Court to determine, based upon the prevailing laws and factors found to exist in each case, whether or not a fee request is reasonable. *Newman v. Piggie Park Enterprises, Inc.*, 390 U.S. 400 (1968).

Appellees would have this Court render an advisory opinion establishing general guidelines as to the reasonableness of a fee, and then remand to the District Court for an Order as to a reasonable fee from which appellees might then appeal. As this Court will note (infra, pp. 7-9), the factual basis upon which appellees aver windfall fees and zero risk-taking is absent here. If the Court were to grant this petition and rule in appellee's favor, the decision would have no impact on the parties to this lawsuit. No ends of justice would be served by this court making a ruling regarding the impact of its November 3, 1983 decision on hypothetical fee arrangements.

III

Even if This Court Were the Proper Forum to Determine Reasonableness, Appellees' Assertion That Appellant's Attorney Shall Receive Windfall Fees Under Sec. 1988 Is Without Merit.

Under the applicable standard, a prevailing plaintiff in civil rights litigation may "ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman v. Piggie Park Enterprises, Inc., supra.*

Appellees have assumed that appellant's attorney contracted to receive a percentage of the verdict award at trial plus *ALL* fees recoverable by appellant under Sec. 1988. Based thereon, appellees assumed further that appellant's attorneys would receive $264,000 of requested fees while appellant would receive only $36,000-$40,000 resulting from this litigation. Appellees then concluded that only appellant's attorney's rights and interests were at stake in this matter, and that counsel was taking no risks. Thus, appellees concluded sufficient special circumstances existed to deny attorney's fees in this case. While appellees have made an attractive argument, it must fail as premised upon speculation rather than fact.

Appellant, as a prevailing party in this case, is entitled to attorney's fees based upon the reasonable value of his attorney's services under Sec. 1988. This holds true regardless of whether appellant agrees to pay those fees to his attorney. *Howard v. Phelps*, 443 F. Supp. 374 (Ed. La. 1978). The Court may supervise fees in a Sec. 1988 case to protect parties from overreaching just as in any case where fees are contingent upon victory at trial.

In this case, appellant contracted with his attorney that his attorney would be entitled to a percentage of all monies recovered for appellant whether through verdict or Sec. 1988.

There was a verdict of $60,000 at trial and thus far a $32,000 Sec. 1988 award of attorney's fees. Appellant's counsel is entitled to a percentage of the $92,000 under its contract rather than $32,000 plus a percentage of the $60,000 verdict. (See Exhibits 1 and 2).

Based upon appellant's contract with his attorney and his requests for attorney's fees to date, his attorney's maximum recovery for fees in this case would be $121,950 while the full value of his services would equal $211,000. Appellant's figures were computed as follows:

Fee Recoverable Out of Verdict	$ 27,000 (45% of 60,000)
Sec. 1988 Fees Pre-Offer	14,400 (45% of 32,000)
Post-Offer Sec. 1988 Fees	63,450 (45% of 141,000)
Sec. 1988 Fees on Appeal	17,100 (45% of 38,000)
Total	$121,950 (45% of 271,000)

Appellant's attorney has no option to take all fees recovered by appellant under Sec. 1988 and stands by the terms of his contract. Considerations of windfall as cited by appellees do not exist. Contrary to appellees' contention, appellant's counsel's position is worse as a result of the contingent fee arrangement than had he contracted for all fees assessable under Sec. 1988. Those principles of *Cooper v. Singer,* 689 F.2d 929 (10th Cir.1982) cited by appellees are, therefore, inapplicable to this case.[1] Indeed, ..."if plaintiff and his or her attorney have agreed on a figure for fees or a percentage, this should constitute the maximum allowable fee ... Thus ... to use the existence of the contingent contract as a 'special circumstance' to deny the award of fees" is improper. *Cooper* at 932.

[1] *Cooper* disavowed the option of the attorney to take a minimum under the contingent fee arrangement while reserving the right to take Sec. 1988 fees, if the latter proved greater.

Conclusion

This Court's decision regarding the applicability of Rule 68 to Sec. 1988 is independent of reasonable fee considerations. The District Court has made no rulings on the reasonableness of any fee request of the appellant and any requests to be made in that Court are subject to the scrutiny of appellees. The "unique-question" appellees herein raise is based solely upon the facts of the cases they cited rather than the facts of this case. Indeed, appellees have raised no valid questions for rehearing in their petition and appellant submits that the petition is dilatory in nature, and serves only to burden the administration of justice and enhance appellant's claim for fees.

For the foregoing reasons, appellant respectfully requests that the petition for rehearing with suggestion for rehearing in banc be denied.

Respectfully Submitted

Attorney for Appellant

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IN THE UNITED STATES COURT OF APPEALS
For the Seventh Circuit

ALFRED W. CHESNY, individually, and as Administrator of the Estate of Steven Chesny, Deceased
Plaintiff-Appellant

v.

J. MAREK, et al.
Defendants-Appellees

No. 82-2927

Affidavit in Support of Answer to Petition For Rehearing

I, James D. Montgomery, being first duly sworn, depose and say as follows:

1. That I was retained to represent the plaintiff-appellant, Alfred W. Chesny, in this cause of action.

2. That Exhibit 1 is a true and correct copy of my attorney's fee agreement with Alfred W. Chesny.

3. That Exhibit 2 is a true and correct copy of the Addendum to Settlement Statement showing the distribution of attorney's fees recovered to date, pursuant to 42 U.S.C., Sec. 1988.

FURTHER, affiant sayeth not.

/s/ JAMES D. MONTGOMERY

SUBSCRIBED AND SWORN TO before me this 14th day of December. 1983.

(illegible)
Notary Public

EXHIBIT NO. 1 TO ANSWER FOR PETITION FOR REHEARING IN UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

August 23, 1979,
Chicago, Illinois

Agreement

I, ALFRED W. CHESNY, hereby retain and employ James D. Montgomery and Montgomery and Holland, attorneys, to prosecute and/or settle all claims for damages against the Village of Berkeley, Illinois, etal., on account of the wrongful death of my son, Steven Chesney, arising out of a shooting incident which occurred at 1416 Hillside Avenue, Apartment 4A, Berkeley, Illinois, on December 19, 1978.

I agree to pay as compensation for services rendered a sum of money equal to 45% of any amount realized from said claims either by settlement or judgment, less $2,000 which has been previously paid by me to said attorneys.

I further agree to pay all costs and expenses incident to the prosecution and/or settlement of this suit.

It is further understood and agreed that no settlement will be made without my consent.

/s/ ALFRED W. CHESNY
Alfred W. Chesny

EXHIBIT NO. 2 TO ANSWER TO PETITION FOR REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Addendum to Settlement Statement

THIS ADDENDUM is attached to and made a part of a certain Settlement Statement dated September 27, 1982, executed by Alfred W. Chesny as Administrator of the Estate of Steven Chesny, deceased, relative to the distribution of attorneys' fees as awarded by the court pursuant to Memorandum Opinion and Order dated November 16, 1982, signed by the Honorable Milton I. Shadur, Judge of the U.S. District Court, in the matter entitled: Alfred W. Chesny, etc. v. J. Marek, etal., Case No. 79 C 4186.

ADDITIONAL SETTLEMENT		$32,000.00
James D. Montgomery		
(45% of 32,000)	$14,400.00	
Alfred W. Chesny, Administrator of the Estate of Steven Chesny, deceased		
(55% of 32,000)	17,600.00	
Total (as above)		32,000.00

I, ALFRED W. CHESNY, hereby acknowledge receipt of a check in the amount of $17,600, dated December 6, 1982, payable to me as Administrator of the Estate of Steven Chesny, deceased, based upon the distribution of proceeds from settlement check in the amount of $32,000, enumerated above.

/s/ ALFRED W. CHESNY
Alfred W. Chesny, individually and as Administrator of the Estate of Steven Chesny, Dec'd.

DATED: December 1, 1982,
Chicago, Illinois.

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT OF JANUARY 20, 1984, DENYING THE PETITION FOR REHEARING (APPENDIX C TO PETITION FOR WRIT OF CERTIORARI).